

65 - INDEPENDENT AGENCIES - REGULATORY

407 - PUBLIC UTILITIES COMMISSION

CHAPTER 895 - UNDERGROUND FACILITY DAMAGE PREVENTION REQUIREMENTS

SUMMARY – This rule describes the responsibilities of excavators, underground facility operators, the damage prevention system (Dig Safe System, Inc.), and the Public Utilities Commission in implementing Maine’s underground facility damage prevention statute. The rule establishes notification, marking, and reporting procedures, defines violations and penalties, and describes the process by which the Public Utilities Commission will enforce the program and monitor its success.

TABLE OF CONTENTS

§ 1	GENERAL PROVISIONS	5
A.	<u>Purpose and Scope</u>	5
B.	<u>Applicability</u>	5
§ 2	DEFINITIONS	5
§ 3	REPEALED	7
§ 4	RESPONSIBILITIES OF THE EXCAVATOR	7
A.	<u>Pre-marking</u>	7
B.	<u>Notification</u>	8
1.	<u>Notification to the Dig Safe System</u>	8
2.	<u>Additional notifications</u>	9
3.	<u>Subcontractors and multiple excavators</u>	9
C.	<u>Excavation</u>	9
1.	<u>Emergency excavations</u>	9
2.	<u>Safety zone</u>	9
3.	<u>Maintenance of markings</u>	10
4.	<u>Unmarked underground facilities</u>	10
D.	<u>Reporting</u>	10

1.	<u>Notice of damage to operator</u>	10
2.	<u>Report to Commission</u>	10
E.	<u>Legal Effect of Non-compliance</u>	10
1.	<u>Excavator</u>	10
2.	<u>Member Operator</u>	10
3.	<u>Non-member Operator</u>	11
F.	<u>Exemptions</u>	11
1.	<u>Commercial Forestry and Borrow Pit Operations</u>	11
2.	<u>Cemeteries</u>	11
3.	<u>Shoulder-grading Activity</u>	12
§ 5	RESPONSIBILITIES OF DIG SAFE SYSTEM	12
A.	<u>Notification</u>	12
B.	<u>System Requirements</u>	12
C.	<u>Public Awareness Programs</u>	13
§ 6	RESPONSIBILITIES OF THE OPERATOR	14
A.	<u>Dig Safe System Membership</u>	14
1.	<u>Members</u>	14
2.	<u>Non-members</u>	15
B.	<u>Marking</u>	15
1.	<u>Purpose</u>	15
2.	<u>Time requirements</u>	15
3.	<u>Markers</u>	16
4.	<u>Marking procedures</u>	16
5.	<u>Newly installed facilities</u>	17

6.	<u>Discovered facilities</u>	17
C.	<u>Reporting</u>	17
1.	<u>Report to Commission</u>	17
2.	<u>Annual activity report</u>	18
3.	<u>New underground facilities</u>	18
4.	<u>Non-member operator registration</u>	18
D.	<u>Natural Gas Operators</u>	18
1.	<u>Applicability</u>	18
2.	<u>Excavation notice to fire departments</u>	18
3.	<u>Emergency management information</u>	19
E.	<u>Legal Effect of Non-Compliance</u>	19
1.	<u>Members</u>	19
2.	<u>Non-members</u>	19
F.	<u>Abandoned or Inactive Facilities</u>	19
1.	<u>Operators with an electronic mapping system</u>	19
2.	<u>Operators without an electronic mapping system</u>	19
§ 7	COMMISSION ACTIVITIES	20
A.	<u>Monitoring</u>	20
A-1	<u>Reference Database</u>	20
B.	<u>Enforcement Action Procedure</u>	20
1.	<u>Notice of probable violation</u>	20
2.	<u>Informal review</u>	21
3.	<u>Recommended decision</u>	22
4.	<u>Adjudicatory hearing</u>	22

5.	<u>Remedial orders</u>	23
6.	<u>Consent agreements</u>	23
C.	<u>Commission Action</u>	23
§ 8	ADMINISTRATIVE PENALTIES	24
A.	<u>Approval Required</u>	24
B.	<u>Penalty Assessment</u>	24
C.	<u>Violations</u>	24
D.	<u>Penalty Level</u>	25
1.	<u>Maximum penalty level</u>	25
2.	<u>Conditions</u>	25
3.	<u>Other consequences of violation</u>	25
E.	<u>Training Requirements</u>	25
§ 9	CONTEMPT	26
§ 10	IMPRUDENT ACTION	26
§ 11	INJUNCTIONS	26
§ 12	WAIVER OR EXEMPTION	26

§ 1 GENERAL PROVISIONS

A. Purpose and Scope. The purpose of this rule is to implement the provisions of the State's underground facility damage prevention requirements contained in 23 M.R.S.A. § 3360-A, "Protection of Underground Facilities." The rule establishes the responsibilities of excavators, operators and Dig Safe System, Inc. The rule also establishes the process by which the Public Utilities Commission enforces this program.

B. Applicability. Dig Safe System, Inc. shall be the damage prevention system that operates in Maine. Unless otherwise indicated, the provisions of this rule apply to all operators of underground facilities, excavators, and Dig Safe System, Inc.

§ 2 DEFINITIONS

As used in this section, unless the context otherwise indicates, the following terms shall have the following meanings.

A. Business Day. "Business day" means a 24-hour day other than Saturday, Sunday or a legal Maine holiday.

B. Borrow Pit. "Borrow pit" has the same meaning as provided in 38 M.R.S.A. § 482(1-A).

C. Commercial Timber Harvesting Activity. "Commercial timber harvesting activity" means the cutting or removal of timber for the primary purpose of selling or processing forest products and includes the attendant operation of mobile or portable chipping mills and of cutting and skidding machinery and the creation, use and maintenance of skid trails, skid roads, winter haul roads and other roads to facilitate timber harvesting.

D. Commission. "Commission" means the Maine Public Utilities Commission.

E. Damage. "Damage" means any impact upon, or removal of support from, an underground facility as a result of excavation or demolition, which according to the operating practices of the operator would necessitate the repair of such facility.

E-1. Damage Prevention Incident. "Damage prevention incident" means an occurrence in which one or more provisions of the Dig Safe law are violated, regardless of whether there is damage to underground facilities.

F. Damage Prevention System or System. "Damage prevention system" or "system" means an organization whose membership is open to all operators of underground facilities located within the State of Maine, which maintains a database, provided by its member operators, that includes the geographic areas in which its member operators desire transmission of notices of proposed excavation and which has the capability to transmit notices of proposed excavation to member operators by teletype, facsimile, computer or telephone.

G. Demolition. "Demolition" means any operation by which a structure or material is wrecked, razed, rendered, moved or removed by means of any tools, equipment or discharge of explosives which could damage underground facilities.

H. Dig Safe System, Inc. or Dig Safe. "Dig Safe System, Inc." or "the Dig Safe System" means the damage prevention system operating in Maine.

I. Emergency. "Emergency" means a sudden or unexpected occurrence involving a clear and imminent danger, demanding that excavation commence within 12 hours to prevent or mitigate loss of, or damage to, life, health, property or essential public services.

J. Emergency Excavation. "Emergency excavation" means an excavation that is necessary to commence within 12 hours of an emergency to prevent injury, death or loss of an existing vital service.

K. Excavation. "Excavation" means any operation in which earth, rock or other material below the ground is moved or otherwise displaced, by means of power tools, power equipment or explosives and includes grading, trenching, digging, ditching, drilling, auguring, tunneling, scraping and cable or pipe driving, except tilling of soil and gardening or displacement of earth, rock or other material for agricultural purposes.

L. Excavator. "Excavator" means any person proposing to make, making or contracting for an excavation.

M. Mechanical Means of Excavation. "Mechanical means of excavation" means excavation using any device or tool powered by an engine except air vacuum methods of excavation.

N. Member Operator. "Member operator" means an operator that is a member of Dig Safe, Inc.

O. Notify, Notice or Notification. "Notice" or "notification" means the delivery of all required information to the person to be notified and the receipt of it by such person in accordance with this rule. To "notify" means to give notice in accordance with the requirements of this rule.

P. Non-member Operator. "Non-member operator" means an operator that is not a member of Dig Safe, Inc.

Q. Operator. "Operator" means the owner or operator of an underground facility. Within this rule, operators are further categorized as "member operators" and "non-member operators."

R. Person. "Person" means an individual, partnership, municipality, state, county, political subdivision, public utility, joint venture or corporation and includes the employer of an individual.

S. Respondent. "Respondent" means a person alleged to have committed a violation under this rule or 23 M.R.S.A. § 3360-A.

S-1. Serious Damage Prevention Incident. "Serious damage prevention incident" means a damage prevention incident that results in the loss of human life, personal injury requiring in-patient hospital admission, evacuation, or potential damages exceeding \$10,000, or that has the potential to pose a significant hazard to the health or welfare of the public.

S-2. Shoulder-grading Activity. "Shoulder-grading Activity" means highway maintenance work that involves the use of a motorgrader or other suitable construction equipment with a blade on the shoulder of a road to remove accumulated sand, gravel, sod or other material to establish drainage away from the traveled portion of the highway.

T. Underground Facility or Facility. "Underground facility" or "facility" means any item of personal property buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, cable television service, electric energy, oil, gas or other substances and including, but not limited to, pipes, sewers, conduits, cables, valves, lines, wires, manholes, attachments, appurtenances thereto and those parts of poles below ground. This definition shall not include highway drainage culverts or underdrains.

U. Underground Facility Operator. "Underground facility operator" means the owner or operator of any underground facility, other than an underground oil storage facility as defined in 38 M.R.S.A. § 562-A(21) or an airport aviation fuel hydrant piping system, used in furnishing electric, telephone, telegraph, gas, petroleum transportation or cable television service. "Underground facility operator" does not include a municipality or a public utility with fewer than five full-time employees or fewer than 300 customers or a person that owns underground facilities on its own property for commercial or residential purposes.

V. Violation. "Violation" means any of the actions identified in 23 M.R.S.A. § 3360-A(6-C) (the Dig Safe law) as violations subject to the imposition of an administrative penalty and acts of non-compliance with the provisions of this rule.

§ 3 REPEALED

§ 4 RESPONSIBILITIES OF THE EXCAVATOR

A. Pre-marking. The excavator shall mark the approximate boundary of a proposed excavation and the excavator's initials in white, or as otherwise established by the Dig Safe System, prior to notifying the Dig Safe System, as required by Section 4(B). If an excavator uses a single stake or other single point indicator as a pre-mark, the excavator must indicate the radius of the proposed excavation area.

B. Notification

1. Notification to the Dig Safe System

a. Notice process. Except for emergency notifications and as provided in Subsection 4(B)(1)(a)(i), an excavator shall notify the Dig Safe System of the location of the intended excavation at least 72 hours, not including Saturdays, Sundays and legal Maine holidays, but not more than 30 calendar days, prior to the commencement of excavation. The excavator shall re-notify the Dig Safe System pursuant to this subsection for each successive 30-day period. Notification may be given in writing, by telephone, or by electronic means. Non-emergency notification shall take place between the hours of 7 a.m. and 5 p.m. on normal business days. In the event of an emergency, an excavator shall notify the Dig Safe System and non-member operators as required by Subsection 4(C)(1), and shall indicate that it is an emergency notification. Each excavator performing excavation work in an excavation area must notify the Dig Safe System pursuant to this subsection.

i. No facilities. If an excavator notifies the Dig Safe System and nonmember operators as required by this Section, and is informed by the Dig Safe System and each nonmember operator, including private landowners, that no underground facilities exist in the proposed excavation area, then the excavator is not required to wait 3 days as required by Subsection 4(B)(1)(a) and may begin excavation immediately.

ii. PUC reference database. Beginning May 1, 2005, an excavator may check the Commission's reference database within 30 days of the date excavation begins to determine whether any member operators have underground facilities in the municipality in which the excavation area is located. The excavator shall re-check the reference database pursuant to this subsection for each successive 30-day period. If the Commission's reference database indicates that there are no member facilities located in the municipality in which excavation is planned, the excavator is not required to notify the Dig Safe System of the planned excavation. The excavator must notify all non-member operators that are listed on the Commission's reference database as having underground facilities in the municipality in which the excavation area is located as required in Subsection 4(B)(2).

b. Acknowledgement. An excavator shall acquire and record an acknowledgement from the Dig Safe System for any notice the excavator sends by electronic means.

c. Blasting. If an excavation involves blasting, the excavator shall notify the Dig Safe System in writing of the date and location of the blasting. This written notice must be given and received at least 24 hours in advance of the blasting, except that, in the case of an unanticipated obstruction requiring blasting, the excavator shall provide written notice not less than four hours in advance of that blasting.

d. Renotification. If the proposed excavation or blasting does not commence within 30 calendar days of notification or the excavation or blasting will be

expanded outside the location originally specified in the notification, the excavator shall renotify the Dig Safe System as specified in this section.

e. Contents of notice. Notification to the Dig Safe System shall contain the following information:

- 1) the name of the individual serving such notice;
- 2) the location of the proposed excavation;
- 3) the name, address, telephone number and the telefacsimile (fax) number, if available, of the excavator;
- 4) the excavator's field telephone number, if available; and
- 5) the type and extent of the proposed excavation.

2. Additional notifications. In addition to notifying the Dig Safe System as required in Subsection 4(B)(1), an excavator shall notify any non-member operator in the area of the proposed excavation. This notice must be in accordance with Subsection 4(B)(1) except that it will be provided directly to the non-member operator and not to the Dig Safe System.

3. Subcontractors and multiple excavators. In the case of an excavation involving subcontractors or other arrangements in which more than one entity qualifies as the excavator under this rule, the excavator directly responsible for performing the excavation shall ascertain that all notifications required by this rule are performed.

C. Excavation

1. Emergency excavations. In an emergency, an excavator may commence an excavation after taking all reasonable steps, consistent with the emergency, to pre-mark the excavation site and notify the Dig Safe System and non-member operators pursuant to Section 4(B).

2. Safety zone. An excavator may not use mechanical means of excavation when excavating within 18 inches in any direction of any marked underground facilities until the underground facilities have been exposed, except that mechanical means may be used, as necessary, for initial penetration and removal of pavement, rock or other materials requiring use of mechanical means of excavation. Once underground facilities have been exposed, further excavation must be performed employing reasonable precautions to avoid damage to the underground facilities (unless the operator of the underground facilities has positively identified the facilities as inactive or abandoned, pursuant to Subsection 6(F)(3), and has indicated that there is no need to protect them from damage), including, but not limited to, any substantial weakening of structural or lateral support of the facilities or penetration or destruction of the facilities or their protective coatings. The lateral boundaries of the safety zone shall be the operator's tolerance zone markings as directed in Subsection 6(B)(4)(b).

3. Maintenance of markings. An excavator shall maintain markings made by an operator pursuant to Section 6(B). If an excavator cannot maintain the markings, the excavator shall request that the operator reapply the markings.

4. Unmarked underground facilities. Any unmarked underground facility discovered during an excavation must be treated as an active facility until the facility operator has been notified by the excavator (pursuant to Subsection 4(D)(1)) and has visited the site and positively identified the facility as inactive or abandoned.

D. Reporting

1. Notice of damage to operator. An excavator who damages an underground facility or discovers an unmarked underground facility shall immediately notify the affected operator. The excavator shall not backfill an excavation where damage has occurred or where an unmarked facility has been discovered without first receiving permission from the affected operator.

2. Report to Commission. An excavator involved in an excavation shall report to the Commission when it has reason to believe that one or more damage prevention incidents as defined in Section 2(E-1) have occurred associated with that excavation.

The damage prevention incident shall be reported on the Underground Facility Damage Prevention Incident Report form available from the Commission (207)-287-3831 or <http://www.maine.gov/mpuc>). The excavator shall submit this report within 10 days of discovering a damage prevention incident.

Any person may report to the Commission any other failure to comply with this rule or other concerns regarding underground facilities damage prevention, using the Underground Facility Damage Prevention Incident Report form.

E. Legal Effect of Non-compliance.

1. Excavator. The failure of an excavator to provide any or all notices required by Subsections 4(B)(1) and 4(B)(2) for an excavation that results in damage to an underground facility or facilities shall be prima facie evidence in any civil or administrative proceeding that the damage was caused by the negligence of the excavator.

2. Member Operator. If an excavator complies with all excavator responsibilities described in Section 4(A) and Subsection 4(B)(1), and if the Dig Safe System does not provide all information pursuant to Section 5(A) or an operator does not provide all information pursuant to Section 6(B) or the information provided fails to identify the location of the underground facilities in accordance with Section 6(B), then an excavator is not liable for any damage or injury caused by the excavation, except on proof of negligence.

3. Non-member Operator. If an excavator provides notice to non-member operators pursuant to Subsection 4(B)(2), and if a non-member operator fails to mark the location of its facilities pursuant to Section 6(B), then an excavator is not liable for any damage or injury caused by the excavation, except on proof of negligence.

F. Exemptions

1. Commercial Forestry and Borrow Pit Operations

a. Activity requiring no written agreement. An excavator is exempt from the notice requirements of Sections 4(A) and 4(B) for any excavation undertaken in conjunction with a commercial timber harvesting activity or borrow pit operation provided the excavation:

1) is not conducted in a public place, on public land or within a public easement, including, but not limited to, a public way;

2) is not conducted within 100 feet of an easement or land owned by an underground facility operator;

3) is not conducted within 100 feet of an underground facility; and

4) does not involve the use of explosives.

b. Activity requiring written agreement. An excavator is exempt from the requirements of Sections 4(A), 4(B) and 4(C) for any excavation undertaken in conjunction with a commercial timber harvesting activity, when that excavation is within 100 feet of an underground facility or on an easement or land owned by an operator or within 100 feet of an easement or land owned by an operator if the excavator:

1) contacts the Dig Safe System to identify all member operators within the area of the excavation;

2) enters into written agreements with all operators within the area of the excavation and with all persons owning the land on which the excavation occurs; and

3) undertakes the excavation in accordance with the terms of the written agreements.

2. Cemeteries. An excavator is exempt from the notice requirements of Section 4(B) for any excavation undertaken within the boundaries of a cemetery if the following procedures are followed.

a. The person responsible for operating the cemetery shall provide notice pursuant to Section 4(B) identifying the entire cemetery as a potential excavation site. Owners and operators of underground facilities within the cemetery shall mark those facilities in accordance with Section 6(B) as applicable. Thereafter, the person

responsible for operating the cemetery shall maintain sufficient records or markings to identify the location of underground facilities within the cemetery.

b. The person responsible for operating the cemetery shall identify the location of any underground facilities within the excavation area and take appropriate action to avoid damage to the facilities.

3. Shoulder-grading Activity. An excavator that is a licensing authority as defined by 35-A M.R.S.A. § 2502(1) or its designee is exempt from Subsection 4(C)(2) for any excavation that is shoulder-grading activity if the excavator complies with this subsection. If an excavator chooses to excavate under this subsection, all owners of underground facilities within the area of excavation must comply with this subsection.

a. The excavator shall provide notice as required by Section 4(B) and the owner or operator of underground facilities shall respond as required by Section 6(B).

b. The excavator shall contact each owner or operator of underground facilities within the area of proposed shoulder-grading activity and describe the scope of its proposed shoulder-grading activity, including the anticipated depth of grading.

c. The owner or operator of each underground facility shall within 3 business days determine and notify the excavator whether the depth of its facility is sufficient to avoid damage.

d. After receipt of notice pursuant to Subsection 4(F)(3)(c), the excavator may commence its shoulder-grading activity in a manner that does not disturb the facilities indicated by the owners or operators of the underground facilities or, if a facility is located at an insufficient depth to allow the proposed shoulder-grading activity, prior to the shoulder-grading activity the licensing authority may require the owner or operator of the underground facility to lower or otherwise move its facility in accordance with applicable law and the terms of its license.

§ 5 RESPONSIBILITIES OF THE DIG SAFE SYSTEM

A. Notification. Upon receiving notice of excavation as required by Section 4(B), the Dig Safe System shall immediately notify all member operators whose underground facilities may be affected by the notice.

B. System Requirements

1. The Dig Safe System shall provide a single, statewide, toll-free telephone number. All telephone directories shall prominently display the toll-free number: 1-(888)-DIGSAFE (1-(888)-344-7233) or such other number that may be established.

2. At a minimum, the Dig Safe System shall staff its operation from 7 a.m. to 5 p.m. each day excluding Saturdays, Sundays and legal Maine holidays. The Dig Safe System shall provide emergency notification 24 hours per day, 7 days per week.

3. The Dig Safe System shall provide adequate communication equipment and personnel sufficient to answer calls within 20 seconds under normal operating conditions or otherwise as soon as practicable.

4. The Dig Safe System shall transmit non-emergency messages to member operators by 6:00 p.m. on the date of receipt. The Dig Safe System shall transmit emergency messages to member operators within 10 minutes of receipt under normal operating conditions or otherwise as soon as practicable.

5. The Dig Safe System may adopt rules requiring face-to-face meetings between excavators and member operators.

6. The cost of operating the Dig Safe System shall be apportioned equitably among its member operators.

7. The Dig Safe System shall maintain adequate records to document compliance with the requirements of this rule. The Dig Safe System shall annually report to the Commission information adequate to demonstrate the extent to which it answers calls and transmits messages within the time frames required by this rule.

8. The Dig Safe System shall assist the Commission to the extent practicable in coordinating access for Maine excavators calling the Dig Safe System to the Commission's reference database.

9. The Dig Safe System shall restrict the use of facility location information provided by Maine operators to those uses required to perform its duties under this Rule and will restrict access to the facility location information to those employees of the Dig Safe System performing such duties. Access to Maine facility location information shall not be available to the general public by electronic or digital technology or by copies of maps and plans. The Dig Safe System shall use reasonable care to maintain all facility location information provided by Maine operators in a secure manner and the Commission may initiate an appropriate investigation to review security protocols.

10. No later than 21 business days after receiving notification of newly installed facilities or planned new facilities pursuant to subsection 6(A)(1)(d)(iii), or discovered facilities pursuant to subsection 6(B)(6), the Dig Safe System shall update its records to reflect the location of these facilities.

C. Public Awareness Programs

1. The Dig Safe System shall provide all member operators with a brochure explaining Dig Safe's objectives, procedural guidelines and opportunities for member participation.

2. Upon request, the Dig Safe System shall provide training to operators and excavators regarding its operations.

3. The Dig Safe System shall conduct a public awareness program, including but not limited to making literature available describing the Dig Safe System, distributing such literature to the public, and making such literature available for purchase and distribution to requesting parties.

§ 6 RESPONSIBILITIES OF THE OPERATOR

A. Dig Safe System Membership

1. Members

a. An underground facility operator, as defined in Section 2(U), must join the Dig Safe System. Any other operator may voluntarily join the Dig Safe System.

b. All members of the Dig Safe System shall pay to the Dig Safe System the cost of operation apportioned to the members pursuant to Subsection 5(B)(6).

c. All members of the Dig Safe System shall maintain communications equipment that is compatible with the Dig Safe System's communication equipment maintained pursuant to Subsection 5(B)(3).

d. Except as otherwise provided in this provision of the rule, beginning May 1, 2005, each Dig Safe System member shall provide to the Dig Safe System the location of all underground facilities that the member would be obligated to mark upon receipt of notice pursuant to Section 6(B). The location must be identified either by association with a street or road, if the facility is within 100 feet of a street or road, or, if the facility is not within 100 feet of a street or road, with sufficient specificity to allow the Dig Safe System to determine the actual location of the facility within a tolerance of 133 feet and in a manner consistent with Dig Safe System methodology. The operator shall provide the information to the Dig Safe System to use in its notification process and, unless otherwise specified in this rule, the operator shall provide the information in a format that the Dig Safe System is capable of using, such as electronic or digital format, or by drawing the specific location of any underground facilities on maps provided by the Dig Safe System.

i. Telephone service drops exempt. Telephone utilities are not required under this provision to provide to the Dig Safe System the location of service drops from a main line to customer premises.

ii. Water utility transmission mains waiver. The Commission shall grant a waiver from this provision for any water utility transmission mains that are downstream of a treatment plant or underground water source and may require the water utility to provide the Dig Safe System with an alternative method of facility location specification, such as a corridor, for notification purposes.

iii. Unless a member operator has provided the Dig Safe System with the location of planned new facilities no fewer than 21 business days prior to installation, the member operator shall provide to the Dig Safe System the location of newly installed and newly discovered facilities or portions of those facilities, no later than 21 business days after a newly installed facility or portion of a facility is covered with soil or other material or after the location of a facility is discovered pursuant to subsection 6(B)(6). For the purposes of this subsection, a facility or portion of a facility is considered covered with soil or other material if it is not visible because of the presence of the soil or other material.

2. Non-members. An operator that is not a member of the Dig Safe System pursuant to Subsection 6(A)(1) shall, upon receipt of the notice provided for in Subsection 4(B)(2), mark the location of its underground facilities in accordance with Section 6(B).

B. Marking

1. Purpose. An operator shall, upon receipt of the notice provided in Subsection 4(B)(2) or Section 5, advise the excavator of the location and size of the operator's underground facilities and all underground facilities used in furnishing electric or gas service that are connected to the operator's facilities, located in the public way and known to the operator within the area of the proposed excavation by marking the location of the facilities in accordance with this subsection. If the operator determines that there are no facilities in the proposed excavation area that it is obligated to mark, it shall inform the excavator in writing, prior to the expiration of the excavator's waiting period, either by electronic facsimile or e-mail or by placing marks at the excavation site that so indicate.

2. Time requirements

a. Initial marking. The operator shall complete marking no later than two business days after receipt of the notice provided for in Section 5 or Subsection 4(B)(2), unless the proposed excavation is of such length or size that the operator cannot reasonably mark all its underground facilities within two business days. In such an instance, the operator shall inform the excavator, and the excavator shall notify the operator of the location in which excavation will first be made. The operator shall mark the underground facilities in that location within two business days and will mark the remaining facilities as soon as practicable.

b. Re-marking. Following an excavator's request to re-mark an excavation area pursuant to Subsection 4(C)(3), an operator shall again mark this location within one business day.

c. Emergencies. An operator shall mark its underground facilities as soon as practicable after receiving notification of an emergency excavation pursuant to Subsection 4(C)(1).

d. Test holes. After receiving notification pursuant to Section 5 or Subsection 4(B)(2), if an operator must dig test holes in order to locate its underground facilities, other operators within the premarked area shall mark their facilities within one

business day of notification from the excavating operator or within a time frame agreed upon by the excavator.

3. Markers. The operator shall use paint, stakes, flags or other appropriate means to mark its underground facilities. The physical characteristics in the area of the proposed excavation shall be considered when determining the type of marker to be utilized. Markers shall conform to the color code established by the Dig Safe System, as follows:

- a. Red: electric power lines, cables, conduit, or lighting cables;
- b. Yellow: gas, oil, steam, petroleum, or gaseous materials;
- c. Orange: communication, alarm, or signal lines, cables, or conduits;
- d. Blue: water, irrigation, or slurry lines;
- e. Green: sewers or drain lines; and
- f. Purple: reclaimed water, irrigation, and slurry lines.

4. Marking procedures

a. Identification. Marking shall identify changes in direction or terminations occurring within the immediate area of the proposed excavation. Where practical, all marking methods shall indicate the width of the underground facility. Markings shall be made at intervals of no more than 25 feet.

b. Tolerance zone. Except if using the centerline marking method described in Subsection 6(B)(4)(c)(2), the operator shall mark a finite area, designated the "tolerance zone," on each side of the underground facility. The operator shall also indicate the depth of the facility, if known. In all circumstances, the tolerance zone for each facility will be an area 18 inches for member operators and 36 inches for non-member operators on each side of the facility for the length of the facility.

c. Marking methods. The operator shall use one of the following marking methods to establish the tolerance zone of an underground facility:

1) The corridor marking method. This method involves placing markers at either boundary of the tolerance zone, such that the markers will be placed away from the facility centerline 18 inches for member operators and 36 inches for non-member operators, plus one-half the width of the facility. If an operator maintains two or more facilities in close proximity to each other within the excavation area, one tolerance zone may include both facilities. In this instance, the boundaries of the zone shall be established by locating the boundaries of each separate facility and placing markers 18 inches for member operators and 36 inches for non-member operators from the outer

boundaries of the multiple facilities. In this circumstance, the operator shall mark the centerline of each facility within the marked boundaries.

2) The centerline marking method. This method involves placing markers directly over the centerline of the facility, permitting the excavator to establish boundaries of the tolerance zone at points located 18 inches for member operators and 36 inches for non-member operators, plus half the width of the facility from the markers. The width of the facility shall be indicated upon the markers. If an operator maintains two or more facilities in close proximity to each other within the excavation area, the operator shall place markers over the centerline of each facility.

3) The offset marking method. This method involves locating the centerline of the facility by placing markers at locations that parallel the facility. The offset marking methods shall be used only when it is impractical to use either the corridor or centerline methods. The markers used for the offset marking methods shall indicate the distance and direction to the centerline of the facility and its width.

5. Newly Installed Facilities. Unless an operator has reason to know that no other excavation will occur in the excavation area within 30 calendar days of the time a newly installed facility is covered with soil or other material, the operator shall mark the location of the newly installed facility or portion of the facility in accordance with subsections 6(B)(3) and 6(B)(4), no later than one business day after the newly installed facility or portion of that facility is covered with soil or other material. For the purposes of this section, a facility or portion of a facility is considered covered with soil or other material if it is not visible because of the presence of the soil or other material.

6. Discovered Facilities. Following an excavator's notification of discovery of an unmarked facility pursuant to Subsection 4(D)(1), an operator shall determine the location of the facility from the point of discovery to the points at which the facility intersects with a known facility or the points at which the facility ends without intersecting with a known facility. No later than 21 business days after the excavator notifies the operator of the discovery of the facility, the operator shall notify the Commission of the location of the facility and, if the operator is a member operator, of its notification of the Dig Safe System pursuant to subsection 6(A)(1)(d)(iii). If the operator believes that it is unable to locate the facility pursuant to this subsection, it shall provide an explanation to the Commission of the reasons for its failure to locate. If the Commission determines that location is unreasonably difficult, it may grant a waiver from the locating requirements of this subsection.

C. Reporting

1. Report to Commission. An operator shall report to the Commission when it has reason to believe that one or more damage prevention incidents as defined in Section 2(E-1) have occurred regardless of whether there is damage to underground facilities.

The damage prevention incident shall be reported on the Underground Facilities Damage Prevention Incident Report form available from the Commission (207-

287-3831 or <http://www.maine.gov/mpuc>). The operator shall submit this report within 10 days of discovering a suspected violation.

In the event of a serious damage prevention incident as defined in Section 2 (S-1) occurs, the operator shall also provide notice to the Commission immediately, after all urgent safety matters have been addressed, in a manner consistent with the most recent notification procedures provided by the Commission.

Any person may report to the Commission any other failure to comply with this rule or other concerns regarding underground facilities damage prevention, using the Underground Facility Damage Prevention Incident Report form.

2. Annual activity report. An operator, except a municipality or a utility with fewer than 5 full time employees or fewer than 300 customers, shall submit a report to the Commission within 75 days after the end of each calendar year that states the total number of excavation notifications received by the operator during the previous year and the total miles of underground facilities it operates.

3. New underground facilities. An operator shall notify the Commission in writing immediately when installing, or when it newly identifies, underground facilities that it is obligated to mark pursuant to Section 6(B) in a municipality in which it did not previously have such underground facilities and shall indicate whether it is a member or a non-member of the Dig Safe System.

4. Non-member operator registration. Each non-member operator shall register with the Commission providing its name, the name and telephone number of a contact person for excavation notifications, and the municipalities, townships, or other civil divisions or territories in which it has underground facilities for use in the Commission's reference database. The non-member operator shall notify the Commission in writing as soon as possible of any changes to this information and shall renew its registration annually by January 31 each year certifying the accuracy of the information on file with the Commission. This requirement does not apply to an entity that only owns underground facilities on its own property for commercial or residential purposes.

D. Natural Gas Operators

1. Applicability. The provisions of this subsection are applicable to gas operators. For the purposes of this subsection, a gas operator is a natural gas pipeline utility or a gas utility other than a gas utility over which the Commission has limited safety jurisdiction pursuant to 35-A M.R.S.A. § 4702.

2. Excavation notice to fire departments. In addition to providing other notices required under this rule, before commencing any excavation for the purpose of working on an underground transmission line, a gas operator shall provide notice of any excavation to the Fire Department within whose service area the excavation will occur. This notice must be in writing or by telephone and must be given at least three business

days prior to excavation. Work may not commence until the operator has received from the Fire Department an acknowledgement of the notice either by telephone or in writing.

3. Emergency management information. Each gas operator shall provide maps that clearly indicate the location and depth of all main supply underground gas facilities to the following jurisdictions:

- a. each municipality within which it operates;
- b. each fire department within whose service territory it operates;
- c. the county emergency management agency for each county within which it operates; and
- d. the Maine Emergency Management Agency.

Within 21 business days of changing the configuration of a gas operator's main supply underground gas facility, the gas operator must provide updated maps to the appropriate entities.

E. Legal Effect of Non-compliance

1. Members. If an operator does not provide all information pursuant to Section 6(B) or the information provided fails to identify the location of the underground facilities in accordance with Section 6(B) or if the Dig Safe System does not provide all information pursuant to Section 5(A), and an excavator complies with all excavator responsibilities described in Section 4(A) and Subsection 4(B)(1) or Subsection 4(B)(1)(a)(ii), then an excavator is not liable for any damage or injury caused by the excavation, except on proof of negligence.

2. Non-members. If an excavator provides notice to non-member operators pursuant to Subsection 4(B)(2), and if a non-member operator fails to mark the location of its facilities pursuant to Section 6(B), then an excavator is not liable for any damage or injury caused by the excavation, except on proof of negligence.

F. Abandoned or Inactive Facilities

1. Operators with an electronic mapping system. Beginning on the date an owner or operator of underground facilities is required by the Public Utilities Commission to implement electronic mapping under Chapter 140 of the Commission's Rules, the owner or operator shall indicate the existence of facilities abandoned or inactive after that date in its electronic mapping system and shall notify an excavator when abandoned or inactive underground facilities exist in the area of a proposed excavation.

2. Operators without an electronic mapping system. If an owner or operator of an underground facility is not required to maintain an electronic mapping system under Chapter 140 of the Commission's rules, the owner or operator shall notify an excavator of any abandoned or inactive facilities in the area of a proposed excavation of

which it is aware. An operator shall be conclusively presumed to be aware of any facilities abandoned after March 28, 2002.

3. When notifying an excavator that abandoned or inactive underground facilities exist in the area of the proposed excavation, the operator must also inform the excavator that:

- a) In addition to the abandoned or inactive facilities, there may also be unmarked, active facilities within the excavation area; and
- b) Anytime an unmarked underground facility is discovered during excavation, the excavator must treat the line as active and notify the operator of the facility, as soon as possible.

Upon receiving notification from the excavator that an unmarked facility has been discovered, the operator must visit the site and positively identify whether the facility is active or inactive.

§ 7 COMMISSION ACTIVITIES

A. Monitoring. The Commission may require operators, excavators, or the Dig Safe System to report information that the Commission determines is needed to monitor the operation of the underground facilities damage program, or to hear and resolve complaints concerning failure to comply with the provisions of 23 M.R.S.A. § 3360-A (the Dig Safe Law) or this rule.

A-1. Reference Database. The Commission shall develop and maintain a database for excavator reference listing the non-member operators that have registered with the Commission as having underground facilities and indicating those municipalities, townships or other civil divisions or territories of the State in which the underground facilities are located, and indicating those in which member operators do not have underground facilities. Beginning May 1, 2005, the Commission will make the reference database accessible by telephone and internet or by other reasonable means. The Commission will update the reference database upon notification by an operator of the presence of underground facilities in a municipality

B. Enforcement Action Procedure. The Commission shall use the following process when it initiates an enforcement action:

- 1. Notice of probable violation
 - a. Preliminary Incident Investigation. The Commission staff shall engage in a preliminary investigation regarding any potential violation of the Dig Safe Law or rules. The preliminary investigation shall include a good faith effort to contact the potential violator and afford that person an opportunity to discuss the matter prior to the issuance of a Notice of Probable Violation (NOPV). Nothing herein shall preclude the issuance of a NOPV if a person cannot be located with reasonable effort or fails to respond to a communication from the staff.

b. Probable violation. If the Commission finds evidence of a probable violation of the Dig Safe Law (23 M.R.S.A. §3360-A) or this rule, it shall issue a NOPV to the respondent. The Commission may delegate the decision concerning the issuance of a NOPV to its staff.

c. Content of notice. The NOPV shall state the name of the respondent, the factual basis for the alleged violation, and the amount of the administrative penalty recommended to resolve the matter.

d. Right to contest. The NOPV shall state that the respondent has a right to contest the allegation of probable violation by requesting, in writing within 30 days, an informal review.

e. Default. If the respondent fails to request an informal review of the NOPV within 30 days of its receipt, the respondent shall be deemed, upon issuance of an appropriate Commission order, to have defaulted and to have committed the violations alleged. A Commission order on default shall be treated as a finding of a violation for purposes of future applications of this rule.

f. Penalty. If the respondent is declared to have defaulted by a Commission order, the respondent shall, upon issuance of the Commission order be liable to pay the administrative penalty or take the action designated in the NOPV unless the Commission orders otherwise. The Commission may not impose a greater administrative penalty than contained in the NOPV without holding an adjudicatory hearing or obtaining the consent of the respondent. The Commission may reduce the penalty or modify any required remedial action as it determines is warranted.

2. Informal review

a. Staff review. If a respondent contests a NOPV, a staff member designated by the Commission shall conduct an informal review. The review shall consist of an informal conference or an analysis of the respondent's written reply, if any, or both. At the request of the respondent, the staff member designated by the Commission may elect to waive the informal conference.

b. Date for informal conference. The informal conference, if not waived, shall be scheduled no less than 21 days, and no more than 60 days, from the issue date of the NOPV.

c. Written reply. The respondent may file a written reply with the Commission on or before the day scheduled for the informal conference. The respondent or the respondent's designee must sign the written reply and shall include a statement of all relevant facts and authority and the basis for respondent's dispute of the alleged violation.

d. Informal conference

1) At the informal conference, the respondent shall have the right to be represented by an attorney or other person, to present evidence and make arguments in support of respondent's position.

2) The Commission shall make available to the respondent any evidence that indicates that the respondent may have violated these rules or 23 M.R.S.A. § 3360-A.

3) The Commission may require any person who may have information relevant to determining responsibility for a damage prevention incident to attend the informal conference, and/or to provide documentation or other evidence.

3. Recommended decision

a. Following the informal conference or the waiver of the informal conference, the Commission staff member shall issue in writing, a recommended decision indicating whether or not the respondent has violated the Dig Safe Law or these rules and the basis for that conclusion, and the recommended disposition.

b. The recommended decision will be sent to the respondent by mail, return receipt requested and forwarded to the Commission.

c. If the recommended decision is adverse to the respondent, the respondent may request an adjudicatory hearing.

4. Adjudicatory hearing

a. Election. A respondent may request an adjudicatory hearing only after informal review. Such request must be made in writing within 30 days of the date of receipt of the staff's recommended decision and shall identify the findings or conclusions in the recommended decision with which the respondent disagrees and indicate the respondent's position on these matters.

b. Failure to request hearing. A respondent that fails to make a timely request for an adjudicatory hearing shall be liable to pay the administrative penalty or take the remedial action designated in the staff's recommended decision upon issuance of a Commission order. Unless otherwise ordered, the Commission will consider this order as a finding of a violation for purposes of future applications of this rule. The Commission may not impose a greater administrative penalty than contained in the NOPV without holding an adjudicatory hearing or obtaining the consent of the respondent. The Commission may reduce the penalty or modify any required remedial action as it determines is warranted.

c. Hearing. The adjudicatory hearing shall be a de novo hearing and shall be conducted in accordance with 5 M.R.S.A. §§ 9051-9064.

5. Remedial orders. After considering all of the evidence, if the Commission finds that a violation has occurred, it may issue a remedial order.

a. Content. The remedial order shall set forth the factual and legal basis of the Commission's findings and may direct the respondent to take any action, including the payment of an administrative penalty, as authorized by this rule.

b. Effect. A remedial order issued by the Commission shall have the same effect as any order issued by the Commission.

6. Consent agreements. Notwithstanding any other provision of this rule, the Commission may at any time resolve an alleged violation with a consent agreement.

a. Content. A consent agreement must be signed by the respondent, or a duly authorized representative, and must indicate agreement with the terms therein.

b. Order. A consent agreement is effective only if approved by the Commission through the issuance of an order.

C. Commission Action

1. In all cases in which respondent has not requested an adjudicatory hearing, the Commission will consider the evidence along with the proposed disposition (uncontested NOPV or staff's recommended decision, or consent agreement), in deliberative session, and take one of the following actions:

a. If the proposed disposition finds that respondent did not commit a violation, the Commission may, by order,

i. accept that finding and take no further action, or

ii. reject that finding and notify the respondent that the matter will be scheduled for an adjudicatory hearing and decision.

b. If the proposed disposition finds that respondent did commit a violation and the respondent agrees to the proposed disposition, the Commission may, by order,

i. Accept the finding and order an equal or lesser penalty or disposition without giving respondent further notice,

ii. Accept the finding but not the disposition and notify the respondent that it has set the matter for adjudicatory hearing to consider a higher penalty or more burdensome disposition, or

iii. Reject the finding and proposed disposition and dismiss the NOPV or notify the respondent that it has set the matter for adjudicatory hearing.

2. In cases in which the Commission has held an adjudicatory hearing, the Commission will consider the evidence in deliberative session and determine whether respondent has violated the Dig Safe Law or this rule.

a. If the Commission finds no violation, it will dismiss the NOPV and take no further action.

b. If the Commission finds that respondent has committed a violation, it may impose any penalty authorized by law.

§ 8 ADMINISTRATIVE PENALTIES

A. Approval Required

1. The Commission must approve in a deliberative session the disposition of every alleged violation that requires payment of an administrative penalty or other remedial action.

2. The Commission's deliberation and approval by order of the imposition of an administrative penalty or other remedial action satisfies the statutory requirement for an adjudicatory proceeding in 23 M.R.S.A. § 3360-A(6-C).

B. **Penalty Assessment.** The Commission may impose an administrative penalty on an excavator or member operator that is found by the Commission in a proceeding under Section 7 to have committed a violation included in Section 8(C) below.

C. **Violations.** The Commission may impose an administrative penalty for any of the following violations:

1. Excavation that does not comply with the requirements of Section 4(A), Subsection 4(B)(1)(a) through 4(B)(1)(d), or Subsection 4(C)(2), except to the extent the excavator is exempt from the provisions of these subsections;

2. Excavation done in a reckless or negligent manner that poses a threat to an underground facility;

3. Failure of a member operator to comply with the requirements of Subsection 6(B)(2)(a) or 6(B)(2)(b), except to the extent the member operator is exempt from the provisions of the subsection;

4. Marking by a member operator of the location of an underground facility in a reckless or negligent manner; and

5. Failure of an excavator to comply with the exemption requirements and procedures of Subsections 4(F)(1), (2), or (3).

D. Penalty Level

1. Maximum penalty level

a. First damage prevention incident within 12 month period.

Except as specified in Subsection 8(E)(2), the administrative penalty for each violation associated with the first damage prevention incident shall not exceed \$500 per violation .

b. Subsequent damage prevention incidents. The administrative penalty shall not exceed \$5000 per violation if during the 12 months preceding the date of the violation the excavator or member operator has been found to have committed a violation pursuant to Section 8.

2. Conditions. In determining the amount of an administrative penalty under this section, the commission shall take into account:

a. Record of the violator, including, to the extent applicable, the number of successful excavations undertaken by the violator or the number of locations successfully marked by the violator during the prior 12 months;

b. Whether the violation resulted in death or personal injury, the degree to which it posed a risk of death or personal injury, and the degree to which it caused or posed a risk of public inconvenience;

c. Amount of property damage caused by the violation;

d. Degree of compliance with other provisions of this rule;

e. Good faith attempts to comply with the violated provision of this rule;

f. Steps to ensure future compliance; and

g. Amount necessary to deter future violation.

3. Other consequences of violation. Administrative penalties imposed pursuant to these rules are in addition to any other remedies or forfeitures provided by law and any liability that may result from the act or omission constituting the violation.

E. Training Requirements. In addition to other actions taken by the Commission, the Commission may require an excavator or member operator who is found pursuant to Section 7 to have violated this rule or 23 M.R.S.A. § 3360-A to participate, at the expense of the violator, in an educational program developed and conducted by the Dig Safe System.

§ 9 CONTEMPT

Failure to comply with any order, decision, rule, or requirement of the Commission may be punished using its contempt authority in 35-A M.R.S.A. §1502.

§ 10 IMPRUDENT ACTION

Compliance with this rule does not excuse a person from acting in a careful and prudent manner nor does compliance with this rule excuse a person from liability for damage or injury for failure to so act.

§11 INJUNCTIONS

Under appropriate conditions, the Commission or an operator may act under the authority of 23 M.R.S.A. § 3360-A(12) and seek a temporary restraining order or injunction to prevent a person from undertaking an excavation that may result in damage to an underground facility.

§12 WAIVER OR EXEMPTION

Upon the request of any person subject to the provisions of this Chapter or upon its own motion, the Commission may waive any of the requirements of this Chapter that are not required by the statute. Where good cause exists, the Commission, the Director of Technical Analysis, or Presiding Officer in a proceeding related to this Chapter may grant the requested waiver, provided that the granting of the waiver would not be inconsistent with the purposes of this Chapter or Title 35-A.

BASIS STATEMENT: The factual and policy basis for this Chapter is set forth in the Commission's Order Adopting Rule and Statement of Policy Basis, Docket No. 2005-549, issued on February 22, 2006; Order Adopting Final Rule, Docket No. 2005-549, issued on May 23, 2006. Copies of this Statement and Order have been filed with this Chapter at the Office of the Secretary of State. Copies may also be obtained from the Administrative Director, Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine 04333-0018.

AUTHORITY: 23 M.R.S.A. § 3360-A, 35-A M.R.S.A. §§ 104 and 111.

EFFECTIVE DATE: This Chapter was approved as to form and legality by the Attorney General on _____. It was filed with the Secretary of State on _____ and will be effective on _____.